

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On February 27, 2013 appellant, then a 40-year-old supervisory border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left eye injury when a tree branch struck him when tracking through a wooded area. OWCP accepted appellant's condition for superficial injury of the left cornea and central opacity of the left cornea. Appellant did not stop work.

On August 7, 2013 Dr. John D. Goosey, a Board-certified ophthalmologist, performed a lamellar keratoplasty of the left eye and diagnosed central corneal scar of the left eye.

On November 13, 2014 appellant filed a claim for a schedule award (Form CA-7).

On February 24, 2015 OWCP referred appellant for a second opinion to Dr. Thomas P. Dowhan, a Board-certified ophthalmologist, for a determination of whether appellant had permanent impairment attributable to his accepted conditions. In a report dated April 20, 2015, Dr. Dowhan noted a history of appellant's work-related incident and subsequent treatment. He indicated that appellant was struck in the left eye by a tree branch while working. Dr. Dowhan noted that the injury left appellant with a superficial scar causing visual impairment. He advised that appellant underwent lamellar keratoplasty to correct the condition and restore vision. Appellant reported a significant decrease in vision in the left eye and photophobia on days when the sun was bright. Dr. Dowhan indicated that maximum medical improvement was reached on August 7, 2013. He noted that following surgery, appellant showed signs of graft rejection, but after medical management his condition has stabilized. Dr. Dowhan diagnosed corneal scar and central opacities. He opined that, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> Table 12-2 and 12-3, Impairment of Visual Acuity, appellant had 75 percent permanent impairment of the left eye.

In a September 30, 2015 report, an OWCP medical adviser indicated that Dr. Dowhan failed to provide letter chart acuity for binocular vision. He requested that Dr. Dowhan provide a visual acuity score so that an acuity-related impairment rating could be accurately determined.

On October 5, 2015 OWCP requested Dr. Dowhan provide a visual acuity score for both eyes. On November 19, 2015 Dr. Dowhan opined that, pursuant to the A.M.A., *Guides*, Table 12-2 and 12-3, the functional acuity score was 85. He diagnosed visual loss of left eye due to corneal opacity. Dr. Dowhan calculated 15 percent visual permanent impairment. In a January 18, 2016 report, the medical adviser agreed with Dr. Dowhan's impairment rating determination of 15 percent permanent impairment of the left eye.

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

In a decision dated February 10, 2016, OWCP granted appellant a schedule award for 15 percent permanent impairment of the left eye. The period of the award ran from May 2 to October 16, 2014.

On August 9, 2016 appellant, through counsel, requested reconsideration. He submitted a new report from Dr. Ronald H. Krasney, a Board-certified ophthalmologist, and asserted that, based on this new evidence, OWCP's decision should be vacated and the previous decision overturned. In his July 5, 2016 report, Dr. Krasney noted a history of appellant's injury and medical treatment. He noted that appellant experienced a difficult postoperative course with early signs of graft rejection which explained his persistent photophobic symptoms and persistent corneal opacities. Dr. Krasney referenced OWCP's medical adviser's note which considered impairment based on visual acuity in both eyes. However, he advised that this method did not truly consider the impairment in the left eye which includes loss of stereopsis. Dr. Krasney indicated that his "own personal comment on this matter is how anyone would feel if they had two of something and now only had one that is functioning." He further noted that "to most anyone, this would be at least 50 percent loss and if it were one's own personal situation this loss might be considered even more severe."

Appellant also submitted a March 9, 2016 report from Dr. Dowhan who treated him for left eye pain, sticky left eye, and headaches from blurred vision which was worse over the last week. Dr. Dowhan diagnosed pain in the left eye, foreign body in cornea of left eye, blurred vision, history of cornea transplant, history of photophobia of the left eye, and cornea edema. He noted removing the exposed part of a suture.

In a September 23, 2016 decision, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant a merit review.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>4</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

"(i) Shows that OWCP erroneously applied or interpreted a specific point of law;  
or

"(ii) Advances a relevant legal argument not previously considered by the  
(Office); or

"(iii) Constitutes relevant and pertinent new evidence not previously considered  
by OWCP."<sup>5</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>6</sup>

### ANALYSIS

By decision dated February 10, 2016, OWCP granted appellant's claim for a schedule award for 15 percent permanent impairment of the left eye. In a September 23, 2016 decision, OWCP denied appellant's reconsideration request, without conducting a merit review, finding that the evidence submitted was insufficient to warrant review of the prior decision as it neither raised substantive legal questions, nor included new and relevant evidence.

However, with his August 9, 2016 reconsideration request, appellant submitted relevant and pertinent evidence not previously considered by OWCP. With his request for reconsideration, appellant submitted a report from Dr. Krasney, a Board-certified ophthalmologist, dated July 5, 2016, who noted that appellant experienced a difficult postoperative course with early signs of graft rejection which explained his persistent photophobic symptoms and persistent corneal opacities. Dr. Krasney referenced OWCP's medical adviser's note which considered impairment based on visual acuity in both eyes, but advised that this method did not truly consider the impairment in the left eye which included loss of stereopsis. He indicated that his "own personal comment on this matter is how anyone would feel if they had two of something and now only had one that is functioning." Dr. Krasney further noted that "to most anyone, this would be at least 50 percent loss and if it were one's own personal situation this loss might be considered even more severe." This particular medical evidence is relevant as it addressed permanent impairment of appellant's left eye. Specifically, Dr. Krasney referenced OWCP's medical adviser's note which considered impairment based on visual acuity in both eyes, but not impairment in the left eye which includes loss of stereopsis. While this evidence may be of limited probative value as to the extent of permanent impairment, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.<sup>7</sup>

The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(3)(iii), the new report from Dr. Krasney is sufficient to require reopening appellant's case for further review on its merits. The case shall be remanded for OWCP to reopen appellant's claim for a merit review. Following this and such other development as deemed necessary, OWCP shall issue an appropriate merit decision on the appellant's claim.

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<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

**CONCLUSION**

The Board finds that OWCP, in its decision dated September 23, 2016, improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 23, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further development in accordance with this decision.

Issued: June 8, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board